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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 567

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

We do not agree with the sufficiency of the scope of Petitioner's statement of the case, and we do not agree that the questions assigned for review are presented by the record in this case or with the reasons assigned by Petitioner for the granting of the writ of certiorari for the purpose of reviewing the interlocutory order of the Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

We agree that the procedural background of this controversy is complex and that the entire history of the case need not be presented in connection with the arguments for and against the granting of the writ. However, the statement of certain basic facts is essential.

Overall, this case involves the propriety of an injunction issued by the District Court in Oklahoma against proceedings for the enforcement by Hyde Construction Company, Inc., Respondent here, of a money judgment entered by the Supreme Court of the State of Mississippi against the Koehring Company, and resulting from a breach of contract action tried in the State Chancery Court of Hinds County, Mississippi. The injunction against the State Supreme Court judgment and the proceedings of that Court for the enforcement thereof grows out of a proceeding by the District Court in Oklahoma in civil contempt, based upon the failure of the State Court to observe a temporary restraining order issued against the initial trial of the case in the State Chancery Court.

On a former appeal from the order imposing sanctions in civil contempt for the benefit of the private litigant, Koehring Company, the Court of Appeals for the Tenth Circuit held that the District Court in Oklahoma had not acquired jurisdiction of the subject matter of the action at the time that its temporary restraining order was first entered, and upon this basis vacated the injunction against further proceedings in the State Court and pretermitted consideration of all other contentions as hereinafter noted. See *Hyde Construction Company* v. *Koehring Company*, (C.A. 10, July 21, 1965) 348 F.2d 643.

On petition of the Koehring Company for a writ of certiorari, this Court reversed the decision of the Court

of Appeals on the single question presented for review and held, contrary to the decision of the Court of Appeals, that the District Court in Oklahoma had acquired jurisdiction of the principal action by virtue of an instanter transfer order of the Court of Appeals for the Fifth Circuit. See *Koehring Company* v. *Hyde Construction Company*, (January 17, 1966) 86 S. Ct. 522.

On the former appeal the Court of Appeals for the Tenth Circuit, after deciding the threshold transfer-jurisdictional question, concluded, with the observation that "Other contentions made on these appeals are either not properly before this Court or are found to be without merit."

In view of the determination at that time by the Court of Appeals that no other contentions save that dealing with transfer-jurisdiction were properly before the Court at that time, this Court rejected Hyde's request that the case be remanded to the Court of Appeals and the case was remanded instead to the District Court for further proceedings consistent with the Court's opinion.

When the case was first before the Court of Appeals and before this Court on petition for writ of certiorari, the State Trial Court judgment was on appeal to the Supreme Court of Mississippi under supersedeas. The original decision and judgment of the Supreme Court of Mississippi was rendered on October 4, 1965, but was suspended by Koehring's petition for rehearing and suggestion of error. It was later revised and made final on February 7, 1966, when the Supreme Court of Mississippi overruled the suggestion of error. See *Koehring Company* v. *Hyde Construction Company*, ... Miss. ....., 178 So.2d 838, and

Koehring Company v. *Hyde Construction Company*, ... Miss. ....., 182 So.2d 580.* All of this occurred subsequent to the first appeal to the Tenth Circuit.

Coming back to the Oklahoma Federal Court proceedings:

On remand of the case to the District Court in Oklahoma, Hyde filed in that Court its "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause." This motion set forth, among other things, the rendition and finality of the judgment of the Supreme Court of Mississippi, together with the fact of full participation by the Koehring Company in the proceedings in that Court, alleging among the grounds for the relief prayed for in the motion res judicata, full faith and credit, estoppel, etc. This amended and supplemental motion was overruled by the District Court, and thereupon Hyde perfected its appeal as authorized under 28 *U.S.C.* 1292, and sought a stay of further proceedings in the District Court pending determination of the appeal.

In response to the appeal, Koehring filed a motion to dismiss the appeal, alleging, as it states, frivolity and lack of jurisdiction. On briefs and argument, this motion was in due course overruled, and from the interlocutory order overruling the motion to dismiss, Koehring seeks review here on its petition for the writ of certiorari.

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*The decision of the Supreme Court of Mississippi settled a number of questions and decided, among other things, (1) that the State Court had the right and duty to proceed to judgment, and (2) that the State Court had jurisdiction of the parties and subject matter. These adjudications were made on the basis of issues injected into the case by the Koehring Company and such determinations are res judicata and are entitled to full faith and credit, as to which see *Baldwin* v. *Iowa State Traveling Men's Ass'n*, (1931) 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244; *Treinies* v. *Sunshine Mining Company*, (1939) 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 1034; *Heiser* v. *Woodruff*, (1946) 327 U.S. 726, 66 S. Ct. 853, 90 L. Ed. 970; *Sherrer* v. *Sherrer*, (1947) 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429; *Johnson* v. *Muelberger*, (1951) 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552; and *Durfee* v. *Duke*, (1963) 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186.

QUESTIONS PRESENTED

Respondent takes issue with the contention that there is presented on this record for review in this Court the questions as stated in the petition for writ of certiorari. As stated by Petitioner, the questions erroneously assume that Respondent seeks to avoid this Court's denial of its request that the case, after reversal here, be remanded to the Court of Appeals instead of to the District Court. The case was in fact remanded to the District Court for further proceedings and on remand further proceedings were had which finally resulted in an appealable order under 28 *U.S.C.* 1292.

We also disagree with the contention that there is involved on this record any question of the "construction" of the opinion and mandate of the United States Supreme Court, our position being simply that the Court of Appeals has the right to consider questions properly presented to that Court for review on appeals authorized by law, and that the determination of that which is properly before the Court of Appeals for review, absent any violation of a mandate of the Supreme Court of the United States, is for that Court to determine.

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

I.

This Is a Rule 20 Petition and As Such Fails to Qualify.

The order in question is interlocutory, and therefore falls within the class of orders covered in Rule 20 of the Rules of the Supreme Court of the United States, which provides in pertinent part as follows:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. . . ."

We respectfully submit that there is no "imperative public importance" attached to the case at bar. This is a civil controversy between private litigants over money. We submit that the present order is not such as is contemplated by the above quoted rule.

II.

The Decision Below Does Not Conflict with Prior Decisions of This Court.

Koehring assumes, as did the District Court, that the mandate of this Court directing that the case be remanded to the District Court "for further proceedings" meant further proceedings in the form of a re-trial of the breach of contract action on its merits and none other, despite the res judicata and full faith and credit applicable to and due the judgment of the Supreme Court of Mississippi. But this is not what this Court directed at all. Indeed, the fact that the mandate did not preclude other proceedings is evident from the concluding phrase of the opinion "reserving to the parties the right to apply to that Court (District Court of Oklahoma) to have the case transferred back to the Southern District of Mississippi because of changed conditions."

It is true that we urged by motion and petition for rehearing in this Court that the case should be remanded to the Tenth Circuit for completion of that Court's appellate processes. On the other hand Koehring, in response, quoted and relied upon the last words of the Court of Appeals as set forth in the concluding sentence of its opinion that:

"Other contentions made on these appeals are either not properly before this Court or are found to be without merit."

Taking the quoted statement at face value, as this Court evidently did, there remained nothing upon which to base an assumption that the Court of Appeals, under its own version of the then status of the record and procedures, had anything left to do in order to complete its appellate review.

While this Court stated no reason for not remanding to the Court of Appeals, it evidently honored that Court's statement that nothing there remained which was then properly before it.

If this were not the situation, it would have been difficult to find any reason, based upon practice and precedent, to by-pass the Court of Appeals on remand of the case, as to which see:

Bates v. *United States,* (1944) 323 U.S. 15, 65 S. Ct. 15, 89 L. Ed. 13;

Brown v. *Fletcher,* (1915) 237 U.S. 583, 35 S. Ct. 750, 59 L. Ed. 374;

Buzynski v. *Luckenbach S. S. Co., Inc.,* (1928) 277 U.S. 226, 48 S. Ct. 440, 72 L. Ed. 860;

Cole v. *Ralph,* (1920) 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567;

Fischer v. *American United Life Ins. Co.,* (1941) 314 U.S. 549, 62 S. Ct. 380, 86 L. Ed. 479;

Gerdes v. *Lustgarten;* (1924) 266 U.S. 321, 45 S. Ct. 107, 69 L. Ed. 309;

Grant v. *A. B. Leach & Co.,* (1930) 280 U.S. 351, 50 S. Ct. 107, 74 L. Ed. 470;

Mitchell v. *Robert De Mario Jewelry, Inc.,* (1960) 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323;

United States v. *Wrightwood Dairy Co.*, (1942) 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726;

Swanson v. *Traer*, (1957) 354 U.S. 114, 77 S. Ct. 1116, 1 L. Ed. 2d 1221, 68 A.L.R. 2d 820; and

United States v. *Beach*, (1945) 324 U.S. 193, 65 S. Ct. 602, 89 L. Ed. 865.

Further proceedings were had in the District Court and such have produced a different record, and the case comes back to the Court of Appeals in a different posture and upon a different appeal from a different order, albeit involving some of the same basic and as yet unreviewed issues, which have always been present.

At least, on the present appeal, it is now the viewpoint of the Court of Appeals that contentions are, in fact, properly before it for adjudication. This follows from the order of that Court overruling Koehring's motion to dismiss the present appeal.

The present posture of the case and the nature and seriousness of the issues presented to the Court of Appeals on the present appeal, and as yet unresolved on review, is indicated by the brief in opposition to Koehring's motion in the Court of Appeals. Hyde's brief, as filed with the Court of Appeals, is attached as an Appendix to this Response.

But Koehring argues that it is exclusively the province of this Court to construe its own mandate. We, of course, agree that this Court is the final authority on the "construction" of its mandates. But this does not mean that the Court of Appeals may not look at the mandate to ascertain what it directs. We also agree that the parties may not relitigate in lower courts issues which have been presented to and precedently decided by this Court. But this does not mean that every issue which might have been but was not presented is removed from the case.

The questions stated in Koehring's petition for certiorari on the former appeal were limited to the transfer-jurisdiction issue. Hyde's response to the petition was limited to a discussion of that single issue.

This Court has not been presented with and has not yet decided a single issue in this case save that of transfer-jurisdiction. The remaining issues were not presented to the Supreme Court for decision, and were therefore left open.

There were no mandated directions from the Supreme Court beyond removal of any objection to proceedings as for lack of transfer-jurisdiction. Encompassed within the mandate was no direction to proceed in any specified manner or to proceed in any specified direction or to proceed to any specified decision or to proceed for any specified time or to any specified extent.

On the remaining matters thus left open, the proceedings had below after remand were in strict accord with the mandate which simply remanded the case "for further proceedings consistent with this opinion." When these proceedings reached a point at which Hyde became entitled to appeal, the appeal was noticed in the regular and usual manner authorized by law.

The appeal is not for a "construction" of the mandate of the Supreme Court. The appeal seeks relief upon issues not heretofore decided by any appellate court and therefore upon issues left open for decision in the normal course of appellate review.

The appeal is allowed by 28 *U.S.C.* 1292.* It has been held that an appeal from an injunction order brings up the entire case for decision on its merits.*

CASES DISTINGUISHED

Koehring relies upon the cited case of *Texas & Pacific Railroad Company* v. *Anderson,* 149 U.S. 237, 13 S. Ct. 843, 37 L. Ed. 717. Other cases cited as being in "accord" are *Ex parte The First National Bank and First National Bank of Chicago* v. *Chicago Title and Trust Company,* 207 U.S. 61, 28 S. Ct. 23, 52 L. Ed. 103; *Kingsbury* v. *Buckner,* 134 U.S. 650, 10 S. Ct. 638, 33 L. Ed. 1047; *Stewart* v. *Salamon,* 97 U.S. 361, 24 L. Ed. 1044; and, for comparison, *Ohio Oil Co.* v. *Thompson,* (C.A. 8th) 120 F.2d 831.

In the *Anderson* case, the Court pointed out that the judgment was "made final by the order of this court, and was not again subject to be reviewed by the court below" and "Every point the receiver could have presented was raised on behalf of the company, and disposed of after elaborate argument and careful consideration." Consequently, the mandate, having been carried out and all issues having been decided, left nothing to be done and nothing was left for review.

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*See: *Meccano* v. *John Wanamaker,* 253 U.S. 136, 40 S. Ct. 463, 64 L. Ed. 822, wherein the Court said: "The power of Circuit Courts of Appeals to review preliminary orders granting injunctions arises from section 129, Judicial Code, which has been often considered. *Smith* v. *Vulcan Iron Works,* 165 U.S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; *Mast, Foos & Co.* v. *Stover Manufacturing Co.,* 177 U.S. 485, 494, 20 Sup. Ct. 708, 44 L. Ed. 856; *Harriman* v. *Northern Securities Co., supra; United States Fidelity & Guaranty Co.* v. *Bray,* 225 U.S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1056; *Denver* v. *New York Trust Co., supra.* This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

Anderson cites *Stewart* v. *Salamon,* supra, and *Humphrey* v. *Baker,* 103 U.S. 736, 26 L. Ed. 456. In both of these cases the rule was simply announced that no subsequent appeal would lie where all of the rights of the parties are determined on the first appeal and nothing is left to be done except "to enter a decree in accordance with our instructions, and carry it into effect" (*Stewart,* at pg. 362).

Ex parte The First National Bank simply holds that a Court of Appeals may not direct a modification or change in the mandate of the Supreme Court and to the extent that it is asked or attempts to do so, jurisdiction is lacking.

The *Kingsbury* case held that "None of the questions which were before the Court on the first writ of error can be reheard or examined on the second."

The *Thompson* case from the Eighth Circuit holds that "In the instant case the decision and mandate of the Supreme Court left nothing open for the subsequent adjudication of the district court," but in so finding, expressly recognized the rule that all issues not presented to and decided by the Supreme Court remain open and subject to decision and review on appeal to the Court of Appeals and the further rule that the Court of Appeals may examine the mandate to determine what it encompassed.

Shortly after decision of the *Anderson* case in 1893, the Court made a distinction in *Mason* v. *Pewabic Min. Co.,* 153 U.S. 361, 14 S. Ct. 847, 38 L. Ed. 745, wherein the Court said:

> "In Railway Co. v. Anderson, 149 U.S. 237, 13 Sup. Ct. 843, the action of the circuit court conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself; and we therefore held, upon the authorities cited, and

> for the reasons given, that, on the facts appearing in that record, the circuit court of appeals could not review by writ of error the judgment of the circuit court. But in this case the circuit court was at liberty to consider, as it did, the application for an allowance out of the fund on the footing of costs between solicitors and clients, and its action in that regard was open to review in the circuit court of appeals."

Citing *Mason,* the Court in *Re Sanford Fork & Tool Co.,* 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414, said:

> ". . . But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. . . ."

The cited cases have no application for the simple reason that none of the questions presented on the appeal to the Tenth Circuit have been before the Supreme Court of the United States. The "transfer-jurisdiction" question was before this Court and has been resolved and is not again raised or mooted on the present appeal. All other questions determined by the Court of Appeals to be now properly before that Court remain open insofar as the previous mandate of this Court is concerned.

CASES IN POINT

While the mandate of the Supreme Court is controlling upon all matters within its compass, this does not mean that lower courts may not freely proceed upon undecided issues. *Sprague* v. *Ticonic Nat. Bank,* 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1148.

A case closely in point on its facts is *Christoffel* v. *United States,* (C.A. D.C. Cir., 1954) 214 F.2d 265, cer. den. 348 U.S. 850, 75 S. Ct. 75. The opinion states, in part, as follows:

"Appellant's conviction of perjury was affirmed by this court in Christoffel v. United States, 84 U.S. App. D.C. 132, 171 F.2d 1004, but reversed by the Supreme Court, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826. Upon retrial appellant was again convicted and we affirmed, 91 U.S. App. D.C. 241, 200 F.2d 734. He again petitioned the Supreme Court for a writ of certiorari. Without briefs on the merits or argument the Supreme Court in a single *per curiam* order granted certiorari, vacated the judgment of this court and remanded the case to the District Court for resentencing under 18 U.S.C. § 231 (1946).[1] Christoffel v. United States, 345 U.S. 947, 73 S. Ct. 868, 97 L. Ed. 1371. This was done. Christoffel again appeals, raising questions not connected with the resentencing which occurred pursuant to the mandate of the Supreme Court, but directed to the earlier District Court proceedings which preceded our decision in 91 U.S. App. D.C. 241, 200 F.2d 734.

"The Government urges that since the mandate of the Supreme Court required, in addition to vacation of our judgment, only resentencing of Christoffel by the District Court, we are without jurisdiction on the present appeal to consider questions unrelated to the resentencing itself.

"We may not review action taken as required by a mandate of the Supreme Court. It is for that Court to construe its own mandate as to all matters encompassed by it. In re Sanford Fork & Tool Co., 160 U.S. 247, 255-256, 16 S. Ct. 291, 40 L. Ed. 414; Gaines v. Rugg, 148 U.S. 228, 238, 13 S. Ct. 611, 37 L. Ed. 432; Ohio Oil Co. v. Thompson, 8 Cir., 120 F.2d 831, certiorari denied, 314 U.S. 658, 62 S. Ct. 112, 86 L. Ed. 528. But the mandate is controlling only as to matters within its compass. Lower courts are free as to other matters over which they have jurisdiction. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184; In re Sanford Fork & Tool Co., supra; Mason v. Pewabic Mining Company, 153 U.S. 361, 14

S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58, certiorari denied, 307 U.S. 648, 59 S. Ct. 1045, 83 L. Ed. 1527; Ohio Oil Co. v. Thompson, supra."

It is equally settled that a lower court may examine the opinion and mandate to determine what was, in fact, encompassed within the command of the mandate to the end that matters not so encompassed may be considered in the usual manner. As stated by the Eighth Circuit in *Ohio Oil Co.* v. *Thompson*, (C.A. 8th, 1941) 120 F.2d 831, 835:

> "It often happens that the appeal to the Supreme Court does not involve all the issues pending in the inferior court; or that the decision and mandate of the Supreme Court leave some question open for the determination of the inferior court; or that in further proceedings in which the appeal occurs new issues may arise and new parties may join or be joined in the litigation. In all such cases the decision of the lower court upon such matter may be reviewed by the proper court. Ex parte The Union Steamboat Company, 178 U.S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084; In re City of Louisville, 231 U.S. 639, 645, 34 S. Ct. 255, 58 L. Ed. 413; Mason v. Pewabic Mining Co., 153 U.S. 361, 14 S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58. On remand the inferior courts are free as to all issues not within the compass of the mandate. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.
>
> "The decision of the district court of issues not submitted to the Supreme Court, of new issues, and of questions left open may be appealed to the Circuit Court of Appeals in all cases where that court would otherwise have jurisdiction. Mason v. Pewabic Mining Co., supra; Illinois Bell Telephone Co. v. Slattery, supra.

"In appeals to this court from decisions of the district court on questions arising in proceedings subsequent to the mandate of the Supreme Court, we may examine the opinion and mandate of that court to determine whether or not the decision is upon a question left open, upon a new issue, or upon some matter properly appealable to this court. . . ."

The distinction between the "construction" of a mandate and an examination of it to determine what was decided and what left open was the subject of discussion in *Illinois Bell Telephone Co.* v. *Slattery,* (C.A. 7th, 1938) 98 F.2d 930, wherein the Court, after noting that the particular issue presented to the Court of Appeals had not been passed upon by the Supreme Court, said:

"It would seem that the construing of a mandate presupposes that a problem has been presented to an Appellate Court and that the Court has passed upon the problem and returned it to the lower Court with its command. . . ."

In *Re Sanford Fork & Tool Company,* 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414, the Court said:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. . . ."

ALSO

". . . But the circuit court may consider and decide any matters left open by the mandate of this court: and its decision of such matters can be reviewed by a new appeal only. Hinckley v. Morton, 103 U.S. 764; Mason v. Mining Co., 153 U.S. 361, 14 S. Ct. 847; Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U.S. App. 97, 2 C.C.A. 542, and 51 Fed. 929. . . ."

In *Ex parte Union Steamboat Company*, 178 U.S. 317, 20 S. Ct. 904, 44 L. Ed. 1084, the Court said:

> ". . . The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (Re Sanford Fork & Tool Co., 160 U.S. 247, 256, 40 L. Ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled. . . ."

And when a lower court looks to see what was encompassed within the mandate to determine the "law of the case" thereby established, the search is to ascertain what was actually decided by the higher court.

As stated in *Hansen & Rowland* v. *C. F. Lytle Co.*, (C.A. 9th) 167 F.2d 998:

> ". . . The principle here applicable is that a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and re-appeal. Mutual Life Ins. Co. v. Hill, 193 U.S. 551, 553, 554, 24 S. Ct. 538, 48 L. Ed. 788; Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552, 562, 45 S. Ct. 441, 69 L. Ed. 785; Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 135, 136, 41 S. Ct. 276, 65 L. Ed. 549; Georgia Railway & Electric Co. v. Decatur, 297 U.S. 620, 623, 624, 56 S. Ct. 606, 80 L. Ed. 925; New York Life Ins. Co. v. Gamer, 9 Cir., 106 F.2d 375, 376, 377; cf. Angel v. Bullington, 330 U.S. 183, 192, 193, 67 S. Ct. 657, 91 L. Ed. 832."

In *Mutual Life Insurance Co.* v. *Hill*, 183 U.S. 551, 24 S. Ct. 538, 48 L. Ed. 788, the leading case on the subject, the Court said:

> ". . . When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to

arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. . . ."

Hill was followed on the point in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U.S. 552, 45 S. Ct. 441, 69 L. Ed. 785.

In *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 41 S. Ct. 276, 65 L. Ed. 549, the Court, in applying the rule, said:

". . . Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. . . ."

Ballard v. *United States*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832, holds that a respondent to a petition for certiorari to the Supreme Court does not waive points not presented by the petition for decision

III.

The Case Presents No Important Questions Involving Interpretation of the Federal Rules of Civil Procedure or of the Judicial Code.

It is provided by the statute on appeals from District Courts, 28 *U.S.C.* 1292(a), that the Courts of Appeals shall

have jurisdiction of appeals from interlocutory orders of the District Courts of the United States refusing to dissolve or modify injunctions. The same statute likewise provides for appeals from interlocutory orders granting injunctions in the first instance.

The first appeal to the Court of Appeals for the Tenth Circuit was from the order granting the injunction against enforcement of the State Court judgment, but on that appeal the determination was made by the Court of Appeals that there were no contentions before that Court at that time except the one dealing with transfer-jurisdiction. This Court, on review of the decision of the Court of Appeals on the first appeal, disagreed with the decision on the transfer-jurisdiction issue, but nevertheless honored the determination by the Court of Appeals as to what was and what was not then properly before that Court on the pleadings and procedures then evidenced by the record. The same Court of Appeals has now determined, by overruling Koehring's motion to dismiss the present appeal, that there are properly before that Court justiciable issues which are ripe for review and decision under the normal processes of appellate practice. We respectfully submit that this determination as to that which is properly before the Court of Appeals should likewise be honored, at least until that Court has completed its appellate function concerning which it has now assumed full responsibility.

This is not a case where a litigant seeks a second review of a question precedently presented to a Court of Appeals or to the Supreme Court and by one of those Courts accepted as a reviewable issue with a resulting decision which becomes the law of the case. As hereinabove noted, the one issue accepted by the Court of Appeals for review on the previous appeal and decided was the issue of transfer jurisdiction, which issue, by virtue of the

reversal by this Court, is no longer involved in the case and is not attempted to be presented again to the Court of Appeals for the Tenth Circuit. The remaining issues which are now presented to that Court and which that Court has accepted for review are those which have not been precedently reviewed and as to which there has been no appellate decision at all. The asserted viewpoint that Petitioner has been foreclosed on these serious issues without a hearing in this Court seems unthinkable.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied and that the Court of Appeals should be allowed to proceed to a final determination of those issues which are by that Court found to be properly presented and before it for decision.

Respectfully submitted,

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APPENDIX

BRIEF OF HYDE CONSTRUCTION COMPANY, INC. IN CAUSE No. 8717 IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT (1) ON PETITION FOR WRIT OF SUPERSEDEAS AND STAY OF PROCEEDINGS AND (2) IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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BRIEF OF PETITIONER ON PETITION FOR WRIT OF SUPERSEDEAS AND STAY OF PROCEEDINGS

The case is presently before the Court for determination of appellant's petition for a stay of further proceedings in the District Court pending an appeal by Hyde Construction Company, Inc. The order appealed from was one of the District Court declining to afford full faith and credit to the final money judgment of the Supreme Court of Mississippi in favor of Hyde and against Koehring Company. Despite such final judgment, the order directed further proceedings looking toward a retrial of the same issues previously litigated and embodied in the judgment and refused to dissolve an injunction against further proceedings in the State Court for collection of the judgment in question. The primary appeal issue involves the plea of res judicata and the plea that the State Court judgment was entitled to full faith and credit under the Federal Statute (28 *U.S.C.* 1738) and the Constitution of the United States (Article IV, § 1).

The present hearing is pursuant to an order entered by Chief Judge Murrah, by which further proceedings in the lower Court were temporarily stayed pending presentation of the matter to this panel. We submit, with deference, that a stay of further proceedings pending appeal is necessary in aid of the appellate jurisdiction of this Court and that, without such stay, important rights of Petitioner which could be protected by the pending appeal will be lost before the appeal can be heard and determined.

Koehring had initiated extensive discovery procedures in the Court below, including the propounding of voluminous interrogatories and the noticing of the depositions of four Mississippi residents to be taken in Tulsa, Oklahoma. The interrogatories were largely repetitious of those previously propounded and answered at large expense, in the State Court and three of the four witnesses

had previously testified in the State Court actions and had been fully interrogated therein by Koehring.

An application for a stay of these proceedings, pending this Court's review, was made to and rejected by the Trial Court. On such refusal of the applications, an application for a stay was there presented to the Chief Judge of this Court, with the above stated result.

The stay of proceedings in the District Court pending appeal is especially urgent in view of the conceded fact that Hyde has become insolvent,[1] with the result that its ability to carry on protracted[2] and expensive litigation is surely impaired.

We now present our plea for relief to this Court upon the certified record as directed by the Chief Judge. We seek to stay further proceedings in the Court below looking toward a retrial of the case, pending determination by this Court, on appeal, of the validity of Hyde's plea of res judicata and full faith and credit.

The appeal now pending in this Court is authorized by 28 *U.S.C.* 1292[3]. Authority for the relief requested, in the form of a stay order pending appeal, is found in the All-Writs Statute, 28 *U.S.C.* 1651.[4]

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1. Tr. pp. 54-55, Hearing in D.C., April 8, 1966.
2. Tr. p. 15, Second Section, Hearing in D.C., April 8, 1966.
3. 28 *USC* 1292 reads, in pertinent part, as follows:
"The courts of appeals shall have jurisdiction of appeals from:
"(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"
4. 28 *USC* 1651 reads, in pertinent part as follows:
"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 265 was the predecessor of 28 *USC* 2283.

Issuance is within the undoubted power of the court and is to be exercised in its sound discretion. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290. The writ sought is especially appropriate in safeguarding the right of a party not to have to relitigate an issue already finally decided. In *Lummus Company* v. *Commonwealth Oil Refining Company*, (C.A. 2d) 297 F.2d 80, a writ was issued by the Court of Appeals to stay trial of a case by arbitration, in view of a different determination by another Court of Appeals of the question or arbitrability of the issues. The court said:

> "In the light of LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957), Commonwealth properly does not challenge our power to issue a writ of mandamus that would reach the District Judge's order; it does challenge the propriety of our exercising the power. We recognize that, as stated in LaBuy, p. 260, 77 S. Ct., p. 315, the power should be used only in 'exceptional circumstances', since to do otherwise would frustrate the basic Federal policy against piecemeal appeals. Hence delay of arbitration through direction of a possibly needless trial of arbitrability in limine would not normally suffice to warrant the issuance of mandamus. See In re Union Leader Corp., 292 F.2d 381, 384 (1 Cir. 1961). We need not decide whether the fact that the delay in this case has already lasted for some thirty months would alone constitute an 'exceptional circumstance'. Here Lummus asserts the District Judge has directed reexamination of an issue that has been conclusively determined in its favor by another Court of Appeals. *The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial,* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), *the right to trial before an unbiased judge,* United States v. Ritter, 273 F.2d 30, 32 (10 Cir. 1959), cert. denied 362 U.S. 950, 80 S. Ct. 863, 4 L. Ed. 2d 869 (1960). In re

> Union Leader Corp., supra, *or the right to trial directly by a judge rather than initially by a master,* LaBuy v. Howes Leather Co., supra. *Accordingly we think the case appropriate for mandamus if Lummus' assertion is made out, as we find it to be.*" (Emphasis ours).

In *LaBuy* v. *Howes Leather Co.*, supra, the action of a Court of Appeals was affirmed as to the issuance of the writ to vacate an interlocutory order of the District Judge referring a case to a master.

Protection of the full faith and credit due judgments of other courts has its roots in the Constitution of the United States (Article IV, Section 1) and in the Acts of Congress (28 *U.S.C.* 1738). The judgments are due full, not merely some, credit. Thus, in *Davis* v. *Davis,* 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26, the court, in referring to the statute, said:

> "Thus Congress rightly interpreted the clause to mean *not some but full credit* . . . The Act extended the rule of the Constitution to all courts, Federal as well as State." (Emphasis ours).

Almost of equal urgency is the necessity of preserving the Congressional policy against the issuance of injunctions against State Court proceedings and thereby avoiding conflict between the two courts of concurrent jurisdiction. 28 *U.S.C.* 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The sweep of the prohibition as applied to proceedings after judgment is spelled out in *Hill* v. *Martin,* 296 U.S. 393, 56 S. Ct. 278, 70 L. Ed. 293, as follows:

"The prohibition of Section 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other."

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

PRELIMINARY STATEMENT

Appellee, Koehring Company, has filed a motion to dismiss this appeal alleging that it is frivolous. Koehring asserts that the Supreme Court of the United States has determined adversely to Appellant all questions which this appeal seeks to present. In effect, Koehring takes the position that this Court is precluded by the Supreme Court's action from any consideration of the merits of this action. Appellant submits that this court has the power to review and determine the vital issues, as developed herein, and that the Supreme Court did not foreclose this court's action on these issues.

STATEMENT OF THE CASE

Appellant, Hyde Construction Company, Inc., hereafter called Hyde, was prime contractor on a construction project concerning the erection of the Keystone Dam Spill-

way in the State of Oklahoma. It contracted with Appellee, Koehring Company, hereafter called Koehring, for the latter to design and install a concrete plant for Hyde's use in the project. A dispute between the parties arose in reference to the performance of this contract. On August 30, 1961, Hyde filed suit against Koehring in the Federal District Court for the Southern District of Mississippi, praying for a money judgment of $500,000.00 for breach of the contract joining an attachment defendant for the purpose of obtaining jurisdiction. Koehring contested the jurisdiction of the Mississippi Federal Court, and in the alternative moved for a transfer of venue to the Federal District Court for the Northern District of Oklahoma.

On August 31, 1961, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the $640,000.00 balance of the purchase price of this concrete plant; but elected not to include, originally or by amendment, any request for a declaratory judgment as to breach of warranty. The balance was later paid. Koehring's claim for attorney's fees was denied and this suit was dismissed by the court.

In view of Koehring's objection to jurisdiction of the Mississippi Federal Court, Hyde, on September 27, 1961, filed a second suit in the Chancery Court of Hines County, Mississippi on the same breach of warranty.

Referring to the identity of the subject matter of each suit filed for breach of warranty, Koehring correctly stated on Page 2 of its brief in this Court on a former appeal (No. 7929) that "In the state court action Hyde alleged the identical cause of action previously asserted in the Mississippi federal court suit, sought the identical attachment, declaratory judgment and injunctive relief previously sought in the federal court, and brought in the

same attachment defendant previously served in the federal suit."[5]

In the filing of these actions, no funds were impounded, no property was seized or levied upon, and no money or other thing was tendered or delivered or paid into the registry or custody of either Court.

In this situation, Koehring took an interlocutory appeal to the Fifth Circuit from an order of the Federal District Court overruling its jurisdictional objection and its motion to transfer, with the result that the Court of Appeals pretermitted the jurisdictional question, but ordered the Federal action transferred to the Northern District of Oklahoma.[6] This occurred on September 19, 1963.

In the meantime, there was considerable activity in the State Court action. *While the State Court action was fully removable by Koehring to the Federal Court, Koehring elected not to remove the action and proceeded to answer the complaint in that Court and to enter a general appearance. Koehring affirmatively invoked the State Court's processes and jurisdiction by pursuing extensive discovery procedures requiring Hyde to produce numerous records and documents and to answer extensive interrogatories, all at great expense.*

The State Court action was scheduled for trial and, after a series of delays, came on for trial at 2:00 o'clock P.M. on March 11, 1964, after the Chancellor had ruled on the preceding day that any further delay would amount to

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5. In its petition for writ of Certiorari to the United States Supreme Court, Koehring stated: "This Controversy involves two identical lawsuits relating to the performance of construction equipment at a U.S. Army Corps of Engineers project near Tulsa, Oklahoma." (No. 593, pg. 4)

6. *Koehring Company* v. *Hyde Construction Company*, (C.A. 5) 324 F.2d 295.

"extreme hardship and injustice" and after an order had been entered by which the parties were "ordered and directed to proceed with the trial."

At 9:45 o'clock A.M. the same day, March 11, 1964, counsel for Koehring presented to the Oklahoma Federal Court a certified copy of the Fifth Circuit's order of transfer, together with a motion for an injunction and a temporary restraining order forbidding further proceedings in the State Court suit, which was to begin trial later that same day. On this petition a temporary restraining order was issued shortly before 2:00 o'clock P.M. The State Court trial commenced at 2:00 o'clock P.M. on March 11, 1964, and Hyde's counsel received news of the restraining order later in the afternoon. In the absence of an agreement to suspend the trial, the trial in the State Court proceeded under the Chancellor's order of March 10, 1964 and continued under a further directive order of March 12, 1964.

Hyde and its State Court attorney were held in civil contempt and Hyde's counsel was arrested in Mississippi on a charge of criminal contempt, under an order of arrest issued by the District Court for the Northern District of Oklahoma, but was released from custody on a Writ of Habeas Corpus issued by the District Judge of the United States District Court for the Southern District of Mississippi.[7]

At the conclusion of the testimony in the State Court action the Chancellor took the case under advisement on briefs. While the case was in this posture, the restraining order issued expired and the court declined to issue an injunction. Thereafter and on April 7, 1964, a decision was made on the merits by the State Court and a judgment was

7. *Dunn* v. *Stewart*, (D.C. Miss. 1964), 235 F.Supp. 955.

entered in favor of Hyde against Koehring in the amount of $464,450.08. The State Court did not pursue the attachment and the attachment defendant was dismissed.

Thereupon Koehring filed its motion in the State Court to vacate the judgment on the ground that the Court lacked jurisdiction, and by means of this motion asserted that the case was quasi in rem, that the same action had been first filed in the Federal Court, and that the trial proceeding had been restrained by order of the Federal Court in Oklahoma. This motion was heard and overruled, and Koehring thereupon perfected an appeal to the Supreme Court of Mississippi, where the same jurisdictional issue was again vigorously presented.

It is well to emphasize at that point that (1) Koehring did not withdraw from the State Court proceedings in reliance upon the restraining order; (2) Koehring elected not to remove the case from the State Court to the Federal Court as it had a right to do; and (3) Koehring fully participated in the State Court proceedings and vigorously sought the favorable judgment of the State Court on all issues, including (a) jurisdiction to proceed to judgment, (b) Hyde's right to recover on the evidence relating to liability and damages, and (c) validity of the judgment as entered.

Not only did Koehring fully participate in the State Trial Court, but it proceeded to invoke the jurisdiction of the Supreme Court of Mississippi,[8] where all issues were tendered for review and where it was, in fact, partially

8. The Court's attention is invited to the fact that the order of September 1, 1964 expressly provided that if Koehring chose to appeal the money judgment rendered against it by the Chancery Court, then "the ones so restrained (Hyde and its attorneys) may participate in and contest" such an appeal. At this point the attachment defendant had been dismissed and was not a party to or affected by the appeal.

successful to the extent of securing a substantial reduction in the amount awarded by the Lower Court.[9]

The Supreme Court of Mississippi, on Koehring's appeal,[10] addressed itself to each issue under appropriate headings, such as "I. State Court Jurisdiction; II. Plea in Bar; III. Issues of Fact; V. Issue of Damages; VI. Questions of Law."

The fourth subdivision of the Court's opinion is without caption, but dealt with the question of the issue of liability for the breach of warranty.

On the jurisdictional point involving the "quasi in rem" argument as presented by Koehring, the Supreme Court of Mississippi, after a full review of the decisions of this Circuit and of the Supreme Court of the United States, concluded in part as follows:

> ". . . It follows that the State Court had jurisdiction to hear and determine the issue joined between the appellant Koehring Company and Hyde Construction Company, Inc., appellee. Particularly in view of the fact that the State Court did not attempt to adjudicate or interfere with the *res* involved in the jurisdiction of the Federal Court and between the parties in that court. . . ."

ALSO

> "We recognize that the Federal Court, however, has power to enjoin state court proceedings to protect its jurisdiction over the *res*. 28 U.S.C. § 2283 (Stay of State court proceedings); De Korwin v. First National Bank of Chicago, 136 F. Supp. 720, (N.D. Ill. 1955), 235 F.2d

9. The judgment was reduced from $464,450.08 to $406,396.89, a reduction of $58,053.19.

10. *Koehring Company* v. *Hyde Construction Company*, (Miss. 1965) 178 So.2d 838. (A copy of this opinion is appended to this brief)

156 (1956); Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D. SC 1955). This power however, does not warrant a Federal Court in enjoining state proceedings, *in personam* or otherwise, that do not interfere with the Federal Court's *in rem* jurisdiction. Albuquerque National Bank v. Citizens National Bank of Abilene, 212 F.2d 943 (C.A. 5th 1954)."

After the comprehensive decision of the Supreme Court of Mississippi was rendered by a unanimous Court, sitting *en banc,* Koehring further invoked the jurisdiction of that Court by filing a suggestion of error, equivalent to a petition for rehearing, and even engaged additional and special counsel. A rehearing was granted and the merits of the case were again extensively briefed and reviewed, but the Supreme Court unanimously adhered to its former decision. See *Koehring Company* v. *Hyde Construction Company,* (Miss. 1965) 182 So.2d 580.

The final judgment of the Supreme Court of Missisippi was entered on February 7, 1966, by which it was ordered that Hyde "do have and recover of and from the appellant, Koehring Company, jointly with Fidelity & Deposit Company of Maryland, surety on the supersedeas bond, the sum of $406,396.89. . . ."

Under the rules of the Supreme Court of the United States, Koehring was allowed 90 days from the entry of the above mentioned order within which to appeal or petition for certiorari. That time has expired and no review of the judgment by the Supreme Court of the United States was requested. There is no other procedure known to law whereby the final judgment of the State Court can further

be called directly into question on the issues there presented and decided. [Cf. *Angel* v. *Bullington*, (1946) 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832]

It follows from the foregoing that all pertinent issues have been presented by Koehring and decided by the Chancery Court of the State of Mississippi and, on appeal, by the Supreme Court of Mississippi in elaborate proceedings in those Courts, in which Koehring was represented and in which it fully participated, therein seeking the favorable judgments of those Courts upon every conceivable issue that could have been presented.[11] Koehring was not completely successful in the State Courts, and its present complaint addressed to the Federal Court system, of which Oklahoma is a part, is born of its dissatisfaction with the outcome of its efforts in the State Courts.

Nevertheless, the Court below has entered an order which requires that the State Court judgment be disregarded, and that the case be retried on its merits from the beginning as if it had never been tried in the State Courts, thus rejecting Hyde's plea of res judicata and refusing to accord to the State Court judgment the full faith and credit required under the Federal Constitution and Statutes. Moreover, this same order which our appeal seeks to bring here for this court's review would, by its terms, enjoin further proceedings in the State Court, looking toward collection of the judgment as rendered by the Supreme Court of Mississippi, thereby further withholding full faith and

11. As a part of the plea of res judicata, Hyde has filed in the District Court the full record of the Mississippi proceedings, covering 14 bound volumes.

credit from the judgment and violating the statutory mandate against enjoining State Court proceedings.[12]

On the initial appeal from civil contempt order below, this Court held that the order was appealable and, after reviewing much of the background of the case, concluded that the order was invalid because of a lack of transfer-jurisdiction.[13] No decision was announced on any other point going to the correctness of the order in view of the threshold determination that the District Court was without transfer-jurisdiction.

On petition for certiorari, however, the Supreme Court of the United States reversed the jurisdictional decision and remanded to the District Court for further proceedings consistent with its opinion.[14]

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12. To the extent pertinent to the above comments the injunctive order provides as follows:

"Now on this 1st day of September, 1964, It is Ordered, Adjudged and Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company."

13. *Hyde Construction Company* v. *Koehring Company*, (C.A. 10th, 1965) 348 F.2d 643.

14. *Koehring Co.* v. *Hyde Construction Co.*, ... U.S. ....., 86 S. Ct. 522.

On remand to the District Court, Hyde filed a motion bringing to the Court's attention Koehring's appeal to the Mississippi Supreme Court and that Court's final judgment. Included in these pleadings was an amended and supplemental motion to dissolve the injunction and to vacate the order of civil contempt and to dismiss the cause. This motion was primarily directed to the plea of res judicata and full faith and credit, plus the statutory prohibition against enjoining the collection proceedings on a State Court judgment. This motion was overruled and this appeal was promptly noticed.

ARGUMENT

I

The Per Curiam Opinion of the United States Supreme Court Is Confined to the Question of Transfer-Jurisdiction and Does Not Determine Res Judicata or Any Other Remaining Issue.

In its opinion of July 21, 1965, in the case of *Hyde Construction, Inc.* v. *Koehring Company,* 10 Cir., 348 F.2d 643, this court held that:

> "The only method by which the (Northern) district court (of Oklahoma) could have acquired jurisdiction below was by way of transfer of the action originally filed in the Mississippi federal court. . . . And since the Mississippi court did not transfer the papers until March 16, subsequent to the entering of the subject restraining order, the court below did not obtain jurisdiction prior to March 16, under normal procedures, since the transfer of the papers, etc., to the transferee court is considered essential to that court's acquiring jurisdiction."

This court limited its decision solely to the question of transfer jurisdiction and specifically stated that any and all other

contentions made were "either not properly before the court or are found to be without merit", hence, were not passed upon.

Koehring petitioned the United States Supreme Court for writ of certiorari and certified the question of jurisdiction only to the United States Supreme Court. Koehring's petition for writ of certiorari is as follows:

"QUESTIONS PRESENTED.

I. Does a Court of Appeals have the power to order the *instanter* transfer of a cause of action when it determines justice demands such a transfer?

II. Absent extraordinary circumstances, may a Court of Appeals reverse the prior decision of another Court of Appeals in the same case on the identical issue and facts?"

Appeals to the United States Supreme Court are by specified questions. 12 U.S.C. 1254. Rule 23 (1) (c) of the Supreme Court Rules is as follows:

"(1) The petition for writ of certiorari shall contain in the order here indicated:

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court.*"

See also Supreme Court Rule 40 (1) (d) (2).

The opinion rendered by the Supreme Court specifically stated that the appeal it granted was sought for and granted only on the question of the jurisdiction of the Fifth Circuit to transfer to the Oklahoma district court and the

decree of this court holding that the Fifth Circuit did not have jurisdiction to transfer. The opinion being in words and phrases as follows, to-wit:

> "Respondents appealed from this decree to the Court of Appeals for the Tenth Circuit which reversed, holding that at the time the District Court had entered the original restraining order it was without jurisdiction since it had not received the case file from the transferror court. We are asked to review that determination. We grant the petition and reverse."

It is well settled law that the United States Supreme Court confines itself to the ground upon which the writ of certiorari was asked and granted, and its review is no broader than that sought by the petitioner. *Helis* v. *Ward*, 308 U.S. 365, 60 S. Ct. 283, 84 L. Ed. 327.

The Supreme Court on certiorari does not decide questions which have not been dealt with by the Circuit Court of Appeals. *Owens* v. *Union Pac. R. Co.*, 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

Koehring contends in its motion to dismiss that the question of res judicata has heretofore been presented to the United States Supreme Court and that it has silently and inferentially ruled thereupon. The question of res judicata was not presented to the Supreme Court. The opinion of the Supreme Court is void of any holding on the doctrine of res judicata and is completely silent as to the issue. Even if a party mentions or makes an argument on an issue, this does not in and of itself bring such question before the Supreme Court. *Mazer et al.* v. *Stein et al.*, 347 U.S. 201, 74 S. Ct. 460, 98 L. Ed. 630. The United States Supreme Court in interpreting its own opinions has said: "We decide no more than the situation before us presents and equally do not imply an opinion on situations

not now before us." At page 367 of *Greenwood* v. *United States*, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412.

The only issue passed upon by this court was that of transferee jurisdiction and it therefore follows as a matter of law that the only question passed upon by the Supreme Court of the United States was that of transferee jurisdiction, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726. The Supreme Court has further specifically held that mere reference in a petition for writ of certiorari to a ruling without a specific request for review will not cause its consideration. *Connecticut Ry. & Lighting Co.* v. *Palmer, et al.*, 305 U.S. 493, 59 S. Ct. 316, 83 L. Ed. 309.

It, therefore, follows that Koehring cannot enlarge upon the per curiam opinion of the United States Supreme Court's decision. There are no inferences to be gained therefrom. It specifically holds that this court was in error in holding that the order of transfer by the Fifth Circuit did not vest the District Court for the Northern District of Oklahoma with jurisdiction until the file was received from the District Court for the Southern District of Mississippi. The sole and only holding of the Supreme Court's opinion is that the northern district court did have transfer jurisdiction vested in it by the order of the Fifth Circuit. This is now the law of this case and Hyde recognizes that the District Court for the Northern District of Oklahoma did have such transfer jurisdiction; however, jurisdiction vested in a state court and a federal district court concurrently does not affect the doctrine of res judicata. The Supreme Court did not by inference or insinuation or by its failure to mention res judicata, overrule such landmark decisions as *Kline* v. *Burke*, 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, which has never been questioned but has always been cited and followed not only by the United States Supreme Court but by this court.

II

The Pending Appeal Is Not Frivolous But Involves Vital Issues.

A

The final judgment of the Supreme Court of Mississippi is res judicata and is entitled to full faith and credit.

The effect of the injunctive order is (1) to nullify the full faith and credit mandate of Federal Law, to which all judicial action is subservient, and (2) additionally, as to paragraph 2 in said order, to transcend the absolute bar of 28 *U.S.C.* § 2283.

Article IV, Sec. I of the *United States Constitution* provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The fundamental force of the full faith and credit policy is mandated upon every court of the United States by Act of Congress. 28 *U.S.C.* § 1738, deals with the subject and, after providing for the form of authentication, concludes:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

In *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, an injunction against enforcement of a State Court judgment was denied, although jurisdic-

tional questions were raised, on the basis of the full faith and credit mandate. The Court said:

> "*The full faith and credit clause, Const. art 4, § 1, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts.* Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905 (28 U.S.C.A. § 687); Mills v. Duryee, 7 Cranch 481, 485, 3 L. Ed. 411; Mutual L. Insurance Co. v. Harris, 97 U.S. 331, 336, 24 L. Ed. 959. Compare Bradford Electric Co. v. Clapper, 286 U.S. 145, 155, 52 S. Ct. 571, 76 L. Ed. 1026. *The principles of res judicata apply to questions of jurisdiction as well as to other issues.* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244. *They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, . . .*" (Emphasis ours)

In *Davis* v. *Davis,* 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26, the Court in referring to the statute, said:

> "Thus Congress rightly interpreted the clause to mean *not some but full credit.* Haddock v. Haddock, supra, page 567, 26 S. Ct., page 526. The Act extended the rule of the Constitution to all courts, Federal as well as State. Mills v. Duryee, 7 Cranch 481, 485, 3 L. Ed. 411." (Emphasis ours)

In *Gannon* v. *American Airlines,* (C.A. 10th) 251 F.2d 476, the Court applied the rule in a case involving an attack upon an Illinois judgment for alleged fraud.

In *Skelly Oil Co.* v. *Phillips Petroleum Co.,* (C.A. 10, 1949) 174 F.2d 89, the court speaking of actions in courts of concurrent jurisdiction, said:

> ". . . when one action has gone to final judgment, that judgment may be set up as a bar in the other action under the doctrine of res judicata."

See also: *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, (C.A. 1st) 284 F.2d 868, wherein the Court applied the full faith and credit mandate to uphold a judgment of a State Court in Vermont where the defendant appeared and contested jurisdiction and the issue was adjudged against him; citing *Davis* v. *Davis*, supra.

In *Midessa Television Co., Inc.* v. *Motion Pictures for Television, Inc.*, (C.A. 5th) 290 F.2d 203, the full faith and credit provision was applied to sustain a New York State Court judgment as against a claim of fraud and lack of jurisdiction, where the judgment creditor had been afforded the opportunity to raise these issues in the State Court.

In *Caterpillar Tractor Co.* v. *International Harvester Co.*, (C.A. 3d) 120 F.2d 82, the Court said of the all consuming principle of res judicata:

> ". . . The general principle back of the rules of res judicata has received recent and clear statement by the Supreme Court. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.' Baldwin v. Iowa State Traveling Men's Association, 1931, 283 U.S. 522, 525, 51 S. Ct. 517, 518, 75 L. Ed. 1244. *A litigant is to have his day in court, but only one day in court, against another. The defendant here is in the position of asking for two days in court if he successfully masked his participation upon his first appearance. That the doctrinal basis of res judicata is living law and not archaic formula is shown in its authoritative extension in recent years.* American Surety Co. v. Baldwin, 1932, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298; Davis v. Davis, 1938, 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26; 118 A.L.R. 1518; Stoll v. Gottlieb, 1938, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104;

> Treinies v. Sunshine Mining Co., 1939, 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85. An argument which seeks to establish a rule directly contrary to this broad principle must justify itself pretty clearly to be successfully maintained."

The argument here which departs from this basic rule is that the outstanding restraining order issued by the Trial Court had the effect of destroying the State Court's jurisdiction or power to proceed to judgment; hence that the Decree finally rendered might be excluded from the broad sweep of the full faith and credit mandate of the Constitution and Act of Congress. But, if the question thus raised was one of jurisdiction or power to proceed, the fact remains that the very question was presented by Koehring to the State Court and it has been decided, by the Supreme Court of Mississippi, in favor of jurisdiction and duty to proceed to judgment in a proceeding which was expressly excluded from the injunction.

Of equal urgency is the necessity of preserving the Congressional policy against the issuance of injunctions against State Court proceedings and thereby avoiding conflict between the two courts of concurrent jurisdiction. 28 *U.S.C.* 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The sweep of the prohibition as applied to proceedings after judgment is spelled out in *Hill* v. *Martin*, 296 U.S. 393, 56 S. Ct. 278, 70 L. Ed. 293, as follows:

> "The prohibition of Section 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which

> may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other."

It is, of course, impossible to give full faith and credit to the judgment of the State Court and at the same time enjoin proceedings in the State Court which are essential to the enforcement of such judgment.

Due process required recognition of the State Court judgment. It created a valuable property right, constituting a lien upon the tangible properties of the judgment debtor and conferring a right to execution. This property right has been asserted in this cause by pleading the judgment as res judicata and insisting upon its entitlement to full faith and credit.

The injunction would nullify the judgment by withdrawing therefrom its essential vitality, namely, its collectibility. It thereby takes the property of the judgment creditor by striking or holding for naught the plea for its recognition under the full faith and credit requirement of the statute and Constitution.

This is the equivalent of taking from Hyde a sum of over $406,000.00 and substituting therefor a mere chance of obtaining another judgment at the end of another trial, subject to all the hazards and expense of litigation.

In erecting a barrier against recognition of the State Court judgment by enjoining collection, refusing the plea

of res judicata and directing a re-trial, there is a taking of the plaintiff's property rights contrary to the full faith and credit mandate of the Constitution of the United States and, therefore, without due process of law as guaranteed by the Fifth Amendment.

Constitutional rights may not be taken away by sanctions in contempt. For example, see *Hovey* v. *Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, holding that a court may not, as a punishment in contempt, strike an answer and enter judgment as by default.

Due process is made especially acute in this case because Hyde is now insolvent and without funds to bear the large expense of re-litigation of the case. Requiring a re-trial in Oklahoma would amount, in practical effect, to the denial to Hyde of its right to present its case at all.[15]

B

The Mississippi Court correctly determined its jurisdiction to proceed.

The determination by the Mississippi Supreme Court of jurisdiction to proceed was correct and in complete accord with the Federal cases on the subject.

We re-emphasize at the outset of this point that there were no funds impounded; no property was seized or levied upon and no money or other thing was tendered or delivered or paid into the registry or custody of either Court and, moreover, the Oklahoma District Court did not even have personal jurisdiction over the Koehring debtor

15. Trial of the case required two weeks in the State Court. Koehring estimates that three weeks would be required for a re-trial in Tulsa, Oklahoma (Tr. p. 15, Second Section, Hearing of April 8, 1966), which does not include time required for depositions, interrogations and pre-trial procedures.

which was joined as an attachment defendant. In short, there was no *thing* under the control of any Court which excluded jurisdiction of the *in personam* aspects of the case or which needed protection in order that the issues could be resolved and relief granted without creating conflict between the courts.

The Tenth Circuit in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, (C.A. 10th) 174 F.2d 89, subscribed to the stated rule in the following language:

> "It is well settled that where two actions involving the same cause of action are pending in a state and Federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief in personam, may proceed at the same time, and, when one action has gone to final judgment, that judgment may be set up as a bar in the other action under the doctrine of res judicata."

In support, the Court cites: *Guardian Life Ins. Co. of America* v. *Kortz*, 10 Cir., 151 F.2d 582, 585; *Wells* v. *Helm*, 10 Cir., 105 F.2d 402, 404; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U.S. 465, 59 S. Ct. 275, 83 L. Ed. 285; *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania*, 294 U.S. 189, 195, 55 S. Ct. 386, 79 L. Ed. 850; *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1007.

In *Wells* v. *Helms*, (C.A. 10th) 105 F.2d 402, the court affirmed a case in which then District Judge Murrah had refused to proceed. It involved the question of the power of the Court to adjudicate the right of a litigant to share in an estate being administered in a State Court. No request for an injunction was involved, but in dealing with *in personam* jurisdiction allowing both courts to proceed independently without interference, the Court said:

"An administrator appointed by a state court is an officer of that court and takes possession of the decedent's property in obedience to the orders of the court. His possession is the court's possession and cannot be disturbed by any other court. Byers v. McAuley, 149 U.S. 608, 615, 13 S. Ct. 906, 37 L. Ed. 867.

"However, a distributee of an estate, citizen of another state, may establish his right to a share in such estate, and enforce such adjudication against the administrator personally or his sureties, or against any other person liable therefor, or *proceed in any way which does not disturb the actual possession of the property by the state court.* Byers v. McAuley, supra; Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920; Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285."

The landmark case in this area is *Kline* v. *Burke Const. Co.*, 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077. In this case the plaintiff first filed suit for breach of contract in the Federal Court and sought an accounting. The case resulted in a mistrial. Subsequently, the plaintiff filed the same cause of action in the Chancery Court of Arkansas. The defendant sought an injunction against prosecution of the State Court suit. The Court of Appeals reversed a denial of the injunctive relief and remanded with directions that the injunction issue. The Supreme Court reversed.

Emphasis in this case centered around the concept of *in personam* actions versus *in rem* or *quasi in rem* actions, the latter terms being used only in the sense of actions "which deal either actually or potentially with specific property or objects." The Court dealt in terms of the "power" to enjoin, stating that "The rule (permitting in-

junction) is limited to actions which deal either actually or potentially with specific property or objects," such as suits wherein property is actually seized under judicial process or the object of the suit is to "enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature."

The following are excerpts from the opinion in the cited case:

> "It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached."

Also

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending."

Also

> ". . . The rank and authority of the courts (Federal and State) are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law

based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Quoting with approval from an Eighth Circuit decision, the Court referring to the "power" to enjoin, said:

". . . The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

The court referred to the duty of the Federal Court to proceed independently when *in personam* relief was requested, and as to the State Court's duty, said:

". . . it was, therefore, equally the duty of the state court to take the case and proceed to judgment. . . ."

In *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania ex rel. Schnader,* 294 U.S. 189, 55 S. Ct. 386, 79 L. Ed. 850, the finding of an absolute necessity of avoiding conflict as a condition precedent to interference with the normal procedures of a State Court was strongly emphasized, the Court saying:

". . . While it is often said that, of two courts having concurrent jurisdiction in rem, one first taking possession acquired exclusive jurisdiction, see Peck v. Jennes, supra, pages 624, 625 of 7 How., 12 L. Ed. 841; Wabash R. Co. v. Adelbert College, supra, page 54 of 208 U.S., 28 S. Ct. 182; Harkin v. Brundage, supra, page 43 of 276 U.S., 48 S. Ct. 268, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to

enable the court to exercise it appropriately and to avoid unseemly conflicts. See Leadville Coal Co. v. McCreery, supra, page 477 of 141 U.S., 12 S. Ct. 28. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Heidritter v. Elizabeth Oil-Cloth Co., 112 U.S. 294, 304, 5 S. Ct. 135, 281 L. Ed. 729; Byers v. McAuley, 149 U.S. 608, 13 S. Ct. 906, 37 L. Ed. 867. . . ."

This Court's well documented decision in *Denver-Greeley Valley Water Users Assn.* v. *McNeil,* (C.A. 10th) 131 F.2d 67, also emphasizes the positive requirement of a finding of necessity to support an injunction as an exception to the statute. The rule was expressed thusly;

"The mere fact that the two suits relate to the same physical property does not justify a restraint of the second suit by the court first acquiring jurisdiction. Empire Trust Co. v. Brooks, 5 Cir., 232 Fed. 641; Harkin et al. v. Brundage et al., 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457. Furthermore, the necessity does not exist which would warrant injunctive relief where the subsequent action does not create a conflict between the courts over the possession or custody of the res, McClellan et al. v. Carland, 8 Cir., 187 Fed. 915; Commonwealth Trust Co. et al. v. Bradford, 297 U.S. 613, 56 S. Ct. 600, 80 L. Ed. 920; General Baking Co. v. Harr, 300 U.S. 433, 57 S. Ct. 540, 81 L. Ed. 730. See, also, Boynton et al. v. Moffat Tunnel Improvement District et al., 10 Cir., 57 F.2d 772; Ingram v. Jones et al., 10 Cir., 47 F.2d 135."

In *Amalgamated Clothing Workers of America* v. *Richman Brothers,* 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600, the Supreme Court speaking of 28 *U.S.C.*, § 2283 declared:

"This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear cut prohibition qualified only by specifically defined exceptions."

The recent case of *Donovan* v. *City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409, points out that early in the history of our country a general rule was established that State and Federal Courts would not interfere with or try to restrain each other's proceedings, and that the rule has continued substantially unchanged to the present day. It was pointed out that "An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem," the rule in such cases being that "the state or federal court having custody of such property has exclusive jurisdiction to proceed."

The *Donovan* case expressly held that state courts are "completely without power" to restrain federal court proceedings in *in personam* actions. While the court did not specifically deal with the reverse situation or the power of federal courts to enjoin state court proceedings *in personam*, the sense of the decision and the history of § 2283 is that the rule works both ways, and that neither the federal courts nor the state courts can enjoin proceedings in the other in *in personam* actions except as specifically authorized by the Acts of Congress and no such authorization is applicable in the present case.

Quoting from an early case, the Court in *Donovan* stated:

"For the heart of the rule as declared by this Court is that: '* * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * *' "

The mere characterization of some part of one court proceeding as *in rem* or *quasi in rem* does not entitle a party litigant in such an action to an automatic injunction against the entire prosecution of a second proceeding which only partially involves some common property. Such a litigant would be entitled at most to enjoin only that part of the second proceeding which necessarily required possession or control of the property which the court first acquiring possession must exclusively exercise in order to proceed with the cause and grant the relief sought. Any broader injunction is prohibited by 28 *U.S.C.*, § 2283 and the spirit of the public policy it embodies

C

The temporary restraining order of March 11, 1964, against all proceedings in the State Court was at least erroneous, if not void, and sanctions in civil contempt based on such injunction are not justified.

Since the restraining order was erroneous if not void, the Koehring Company, a private litigant, may not be advantaged by an error which it provoked in the first instance, as no one may in a court of justice, profit by his own wrong.

As pointed out above, it stands adjudicated that the State Court had the jurisdiction, right and duty to proceed to judgment on the purely in personam aspects of the case. When Koehring caused a contrary order to issue on its petition to the District Court, it procured that to be done which ought not to have been done. Since the *fact of error* exists, any question as to Koehring's intentions in its commission is irrelevant. It ill befits Koehring to seek now to profit from its own misguidance by seeking a re-trial of that which has been once tried and finally adjudicated.

Koehring did not even make out by its petition a prima facie case in avoidance of the mandate of the anti-injunction statute. (28 *U.S.C.* 2283) It had the burden of proof on its petition. *U. S.* v. *Borden Company*, 347 U.S. 514, 74 S. Ct. 703. It was required initially to make a prima facie showing, which it wholly failed to do. *Congress of Racial Equality* v. *Douglas*, (C.A. 5th) 318 F.2d 95, cert. den. 375 U.S. 829; *W. A. Mack, Inc.* v. *General Motors, Inc.*, (C.A. 7th) 260 F.2d 886. The validity of an injunction order is dependent on the legal sufficiency of the pleadings to support it. *Abbott* v. *E. Mass. St. Ry. Co.*, (C.A. 1st) 19 F.2d 463; *U. S.* v. *DeParco*, (C.A. 7th) 164 F.2d 124, 126.[16]

The only grounds alleged in support of the motion were insufficient for, as the court in *Commerce Oil Refining Corp.* v. *Minor*, (C.A. 1st) 303 F.2d 125, stated:

> "The mere burden on a party of being 'subjected to litigation in other courts' is precisely what comity requires the Federal court to disregard as a ground for intervention."

In *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S. Ct. 465, 84 L. Ed. 447, the Supreme Court pointed out:

> "Neither record nor findings below give any other basis for injunctive relief save the threatened injury implied in the State Court lawsuit; and that could not be enjoined."

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16. The grounds set forth in Koehring's motion for the temporary restraining order in substance consisted of the assertion (1) that the convenience of the parties and witnesses would be served; (2) that trial in the State Court would subject Defendant to harassment, undue hardship and immediate and irreparable injury; and (3) that the limited discovery procedures available in the State Court made the development of pertinent evidence exceptionally difficult and that certain records on file in the office of the U. S. Corps of Engineers had not been made available to Defendant under the State discovery procedures. No statement in the motion included any reference to the contention that the action was in rem or quasi in rem, this subject being mentioned for the first time in the course of the arguments of counsel. (See Record on Original Appeal, Page 45)

The basic concept of 28 *U.S.C.*, § 2283 and the policy of avoiding needless conflict between the courts is illustrated by numerous decisions as set forth in Point II B.

In summary, it is noted that the only basis on which Koehring has ever asserted a right to restrain the State Court proceedings, within or outside its petition therefor, consisted of the contention that (1) it was burdensome for it to try the case elsewhere than in Oklahoma, and (2) that the case was in rem or "quasi-in-rem" to the extent of depriving the State Court of jurisdiction and vesting jurisdiction in the Federal Court where the action was first filed.

But the "burdensome" argument has been universally rejected. The "quasi-in-rem" argument does not fit any decision of any Court under the facts of this case and has been rejected by the Supreme Court of Mississippi on Koehring's appeal to that Court.

Therefore, the error in the issuance of the restraining injunction is apparent and Koehring may not profit by the wrong to any extent or degree whether such profit be called "restoration of status quo" or award of "damages."

Since all of the facts which could have been presented to the court below demonstrate that Koehring was not entitled to any injunctive relief, it cannot benefit from civil sanctions.

In *Salvage Process Corporation et al.* v. *Acme Tank Cleaning Process Corporation*, (C.A. 2d) 86 F.2d 727, the court stated:

> "A conviction for criminal contempt may indeed survive the reversal of the decree disobeyed; the punishment is to vindicate the court's authority which has been equally flouted whether or not the command was right. But the same cannot be true of civil contempts,

which are only remedial. It is true that the reversal of the decree does not retroactively obliterate the past existence of the violation; yet on the other hand it does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was no right at all. *To let the liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do.* Worden v. Searls, 121 U.S. 14, 7 S. Ct. 814, 30 L. Ed. 853; In re Fanning, 40 Minn. 4, 41 N.W. 1076; Red River Potato Growers' Assoc. v. Bernardy, 128 Minn. 153, 150 N.W. 383; Pelzer v. Hughes, 27 S. Ct. 408, 3 S.E. 781; Smith v. McQuade, 59 Hun. 622, 13 N.Y.S. 63 (Gen. Term)." (Emphasis added)

The precise reasoning of *Salvage Process Corporation* was adopted in *United States* v. *United Mine Workers,* 330 U.S. 258, 294, 295, 67 S. Ct. 677, 91 L. Ed. 884. In this case the Supreme Court considered the correctness of civil contempt sanctions in an analogous situation and ruled:

"It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. *The right to remedial relief falls with an injunction which events prove was erroneously issued,* Worden v. Searls, supra, 121 U.S. at pages 25, 26, 7 S. Ct. at page 820, 30 L. Ed. 853; Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 2 Cir., 1936, 86 F.2d 727; S. Anargyros v. Anargyros & Co., C.C. 1911, 191 F. 208; and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court." (Emphasas ours)

In *Cliett* v. *Hammons,* (C.A. 5th) 305 F.2d 565, the rule is expressed as follows:

". . . Civil contempt falls with the order if it turns out to have been erroneously or wrongfully issued."

The argument has been made that the Restraining Order has not been "set aside or reversed," but that it simply expired by the lapse of time, and this is made as a basis for distinguishing cases such as *U. S.* v. *United Mine Workers.* But this reasoning overlooks the basis for the conclusion that civil sanctions fall with the order violated. *It does not matter how the order is determined to be erroneous but it is the fact of error which forms the basis of the rule that a civil right may not be predicated on a civil wrong.*

D

In no event could the rejection of the judgment be justified.

We have demonstrated that the restraining order was civilly erroneous and that it cannot benefit the private litigant in any area or to any degree, since the right to remedial relief is dependent upon the ultimate determination that the injunction should have been issued and was rightfully issued on request of the private litigant.

But even in cases where a private litigant is entitled to a recovery from proceedings in civil contempt, such recovery is universally limited to the damages actually suffered, as to which the litigant has the burden of proof.[17]

Beginning then with the stated premise, the question would remain as to whether Koehring can show that it has been legally damaged by the State Court proceedings or by the resulting judgment.[18] Even more accurately, can

17. See cases cited under Point II C, above.

18. The trial court's judgment was entered after the restraining order had expired and after Judge Barrow had refused an injunction and, as shown, the Supreme Court proceedings were not only not restrained but Judge Barrow expressly permitted Hyde to proceed.

Koehring be heard to complain when it did not elect to stand on the restraining order but, on the contrary, fully participated in the State Court proceedings in the Trial and Supreme Courts?[19]

We submit that Koehring cannot demonstrate any damage cognizable at law or in equity and is estopped from launching a collateral attack upon the judgment, simply because it was not to its liking.

In *Baldwin* v. *Iowa State Traveling Men's Ass'n,* (1931) 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, the Court dealt with res judicata of a jurisdictional dispute and in applying the doctrine, said:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction."

Just as the respondent in *Baldwin* had the election not to appear at all, Koehring had the election to stand on its restraining order and decline to participate in the State Court proceedings. Had it done so and had it developed that restraining order which it procured was correctly obtained and a judgment had resulted without its participation, we would have a different case now.

Instead, it elected not to remove the case to the Federal Court, as it had a right to do, and then fully participated in the State Court proceedings. It invoked af-

19. If the favorable judgment sought by Koehring in the State Courts had been completely obtained, it doubtless would be here pleading res judicata and full faith and credit.

firmatively the processes and procedures of the State Court system and vigorously sought at the hands of the Trial Court its favorable decision. Failing there to carry the day, it proceeded to file a supersedeas and appeal to the highest Court of the State, where it again vigorously sought a favorable judgment and where it was, in fact, partially successful. It went even further and sought, and succeeded in obtaining, a full scale rehearing and again sought affirmative relief. It was only after it failed to secure the judgment which it sought that its dissatisfaction took the turn of this collateral attack upon the jurisdiction of the Court in which it participated. As further stated in *Baldwin*, supra:

> "The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri district Court, would be to deny the due process guaranteed by the 14th Amendment; but there is involved in that doctrine no right to litigate the same question twice (Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 61 L.ed. 966, 37 S. Ct. 492, compare York v. Texas, 137 U.S. 15, 34 L.ed. 604, 11 S. Ct. 9)."

Moreover, Koehring abandoned its right to seek certiorari review by the Supreme Court of the United States of any alleged error in the State Court proceedings. If any Federal right was violated, the orderly way to relief was by appeal and not collateral attack. [See *Angel* v. *Bullington*, (1946) 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832].

E

The District Court lacked jurisdiction, since the cause of action had been dismissed by Hyde's notice of dismissal.

At a time when there were no pleadings on file in the Federal Court in Mississippi joining issue on any part of the merits of the action and only purely procedural de-

fenses had been raised, Hyde filed on February 15, 1964 and served upon Koehring a motion seeking a stay or construction and interpretation of the mandate of the Fifth Circuit so as to permit the action to remain in the Mississippi District Court. Said motion-pleading contained a notice of dismissal which provided that should the action be held subject to transfer to Oklahoma notice was "now" given that the action was "hereby dismissed without prejudice." After receiving service of a copy of this instrument and after the same had been filed with the clerk of the District Court in Mississippi, Koehring mailed to Hyde's attorney an instrument styled in the United States District Court for the Northern District of Oklahoma entitled, "Answer." It bore no civil action number, nor was any file then in existence in the Clerk's office in said Oklahoma court.

The District Judge in Mississippi, after refusing to act favorably on Hyde's motions, ruled that the voluntary notice of dismissal operated to dismiss the case without prejudice. However, the Fifth Circuit ruled that the service of the Oklahoma "answer" document by Koehring, after it had full notice that Hyde had elected to voluntarily dismiss rather than prosecute the suit further after transfer to Oklahoma, abrogated Hyde's rights to effect a voluntary dismissal under Rule 41(a)(1) of the *Federal Rules of Civil Procedure*. With all due deference, we submit that this holding, given without the benefit of briefs of counsel, was contrary to the plain language of the Federal Rules of Civil Procedure and was erroneous. Thereafter, on March 11, 1964, the answer was filed in Tulsa for the first time.

We respectfully call to the court's attention that we deal here with a portion of an interlocutory order of the Fifth Circuit on a question of jurisdiction.

The decision of the emergency panel of the Court of Appeals for the Fifth Circuit on this jurisdictional issue does not preclude or limit this court's consideration of the propriety of setting the dismissal aside. *Commerce Oil Refining Corp.* v. *Miner,* (C.A. 1st) 303 F.2d 125, 128. No court is without power to reconsider previous rulings by courts of coordinate jurisdiction upon interlocutory matters which have not become fixed by final judgment. *U. S.* v. *U. S. Smelting, Refining & Mining Co.,* 339 U.S. 186, 70 S. Ct. 537, 94 L. Ed. 750. Indeed, since this ruling involves a controlling question of jurisdiction, it may be raised at any time. The court would consider such a question on its own motion even if no party urged it. *Lansden* v. *Hart,* (C.A. 7th) 180 F.2d 679, cert. den. 340 U.S. 824, 71 S. Ct. 58, 95 L. Ed. 606.

A nearly identical situation with that here presented was considered by the Court of Appeals for the Second Circuit in *Littman* v. *Bache & Co.,* (C.A.2d) 252 F.2d 479. In this case the defendant's responsive pleading was a motion to transfer. Before hearing, the plaintiff filed a notice of dismissal. The court vacated this notice and ordered the case transferred. The appellate court reversed.

In *Kilpatrick* v. *Texas & Pacific Rwy. Co.,* (C.A. 2d) 166 F.2d 788, the same circuit, speaking through Judge Learned Hand, ruled that a motion by a defendant railway company to dismiss on the ground that it was not "doing business" within the pertinent laws of the State of New York and that it should not be forced to trial two thousand miles from the place of injury was not such a motion as would prevent the plaintiff from availing himself of the provisions of the Rules permitting notice of voluntary dismissal.

The most liberal construction of Rule 41(a)(1) made by any court or even urged by text writers or commen-

tators would not terminate the right vested in plaintiff to achieve a voluntary dismissal by notice, unless the parties had actually joined issue *on the merits of the controversy*, as distinguished from controversies over procedural questions. See e.g., *Toulmin* v. *Industrial Metal Protectives*, (D.C. Del. 1955) 135 F. Supp. 925; and *Wilson & Co., Inc.* v. *Fremont Cake & Meal Co.*, (D.C. Neb., 1949) 83 F. Supp. 900, 12 F.R. Serv. 41a. 111, Case 4, in which District Judge Delehant collected and discussed numerous authorities in an exhaustive opinion on the proper application of Rule 41(a)(1).

Neither the length of time the case had been pending nor the complexity of the procedural issues presented determine a plaintiff's voluntary dismissal by notice rights, but rather such rights are governed alone by the service of a pleading raising the merits of the controversy. 5 *Moore's Federal Practice* (2nd Ed.), § 41.01 (3), pp. 1029, 1030. See also, *United States* v. *Greater Blouse, Skirt and Neckwear Contractors Ass'n*, (S.D., N.Y., 1964) 35 F.R.D. 130, 8 F.R. Serv. 2d 41a 111, Case 2. To go further would clearly require amendment of the rule. 2B *Barron & Holtzoff, Federal Practice & Procedure* (Wright Ed.), § 911, pp. 107, 108; and 5 *Moore's Federal Practice* (2nd Ed.), § 41.02 (3), p. 1031.

In the instant case no issue on the merits had been joined when plaintiff's notice of dismissal was filed. In fact, no issue on the merits was ever joined in the Mississippi District Court. The "answer" instrument served by defendant after plaintiff's notice was only to be filed when and if the case reached Oklahoma.

If it be urged that the notice of dismissal was based on a "contingency," it must likewise be recognized that the "answer" was also "conditioned." By its own express terms, it was to be lodged with the Oklahoma and not the

Mississippi court. Its "condition" was one which was subsequent to that of the notice. Certainly it cannot be gainsaid that prior to the service of the answer document plaintiff had on file a document precisely detailing its dismissal intention. Cf. *Wilson & Co., Inc.* v. *Fremont Cake & Meal Co.*, supra, 83 F. Supp. at page 903.

The position of the parties in this case is very similar to the case considered by the Missouri District Court in *Flaig* v. *Yellow Cab Co. of Missouri*, (W.D. Mo. 1944) 4 F.R.D. 174, 8 F.R. Serv. 41a, 111, Case 2. In that case the defendant was clearly notified that plaintiff proposed to dismiss a removed action as soon as the Federal District Court acquired jurisdiction. Prior to the time that the defendant there filed the transcript of the case in the office of the U. S. District Clerk, it prepared and, concurrently with the filing of the transcript, served an answer. The court held that the defendant could not thus deprive plaintiff of the provisions of the rule for voluntary dismissal and that precedent notice of an intent to dismiss was enough. The same rationale was applied by the District Court in *Kohloff* v. *Ford Motor Co.*, (S.D., N.Y. 1939) 29 F. Supp. 843, 2 F.R. Serv. 41b, 23, Case 1. See also 5 *Moore's Federal Practice*, § 41.02 (2), pp. 1022, 1033, and the other cases cited in footnote 5 there.

In the present case, Koehring was made fully aware of the fact that plaintiff had elected to dismiss the action if it was to be transferred to Oklahoma. The mere mailing to counsel for plaintiff of an "answer" styled in the prospective Oklahoma court, under such circumstances, cannot thwart the right clearly vested in plaintiff by the rule. The fact that plaintiff's motive in dismissing was to try the same case in another forum where the parties were at issue on the merits and had pursued extensive (and expensive) discovery, cannot alter the right vested by the

rule. *Mott* v. *Connecticut General Life Ins. Co.*, (N.D. Iowa, 1942) 2 F.R.D. 523; *Wilson & Co., Inc.* v. *Fremont Cake and Meal Co.*, supra.

Inasmuch as the case was validly dismissed by plaintiff's notice, in accordance with the rules, prior to the time the case was transferred, the District Court never acquired jurisdiction; and with all due deference, the orders entered, including the Temporary Restraining Order, were void.

CONCLUSION

We respectfully submit that the requested stay of proceedings in the District Court should be continued in effect and that Koehring's motion to dismiss Hyde's appeal should be overruled and that upon final consideration, the District Court's injunctive order should be dissolved and that the order in civil contempt should be vacated and this cause dismissed with prejudice in recognition of the validity of the State Court judgment under the doctrine of res judicata and under the Constitutional and statutory requirement of full faith and credit.

Respectfully submitted,

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